No. 80-1909

IN THE

Supreme Court of the United States

October Term, 1981

THE HEPPENSTALL COMPANY,

Petitioner

v.

WILLIAM A. MURPHY, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S BRIEF IN RESPONSE TO BRIEF FOR UNITED STATES AS AMICUS CURIAE

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This Brief is submitted pursuant to Rule 22.6 of the Rules of the Supreme Court and is responsive to the brief filed on behalf of the United States as *amicus curiae.*

REASONS FOR GRANTING THE WRIT

The decision of the court below is contrary to Rule 56 of the Federal Rules of Civil Procedure as well as being contrary to this Court's decisions in *Nolde Brothers, Inc. v. Bakery Workers,* 430 U. S. 243 (1977) and in *Nachman Corporation v. Pension Benefit Guaranty Corp.,* 446 U. S. 359 (1980).

ARGUMENT

This Petition for a Writ of Certiorari seeks review of the decision of the United States Court of Appeals for the Third Circuit affirming the grant of partial summary judgment in favor of sixteen retired employees of Petitioner [1] on the liability aspect of a claim denominated: (1) by plaintiff-employees in their complaint as a suit in equity seeking injunctions mandating, first, payment of vested but unfunded pension benefits and, second, mandating contributions to the pension fund albeit the fund was terminated [2]; (2) by the *nisi prius* court as an action in the nature of *indebitatus assumpsit, i.e.,* an action at law rather than the suit at equity seeking injunctive relief which Plaintiffs had in fact commenced (17a); and (3) by the court below as a claim arising "under both the federal common law of labor-management contracts, and the federal common law of pension plans", 635 F. 2d at 237. The jurisdiction of the Court of Appeals was based upon a Section 1292(b) certified order. The court below reached beyond the certified question to "consider all grounds which might require a reversal of the order appealed

1. Respondents' motion to amend the complaint in order to seek class action certification and relief was withdrawn without prejudice in the lower court; the applicable statute of limitations has not expired.

2. A related case has determined, following two appeals by PBGC and the United Steelworkers of America to the Court of Appeals for the Third Circuit that the pension plan was properly terminated as of May 31, 1979. *PBGC v. Heppenstall Co.,* 633 F. 2d 293 (3d Cir. 1980); *Ibid.,* No. 81-1658 (3d Cir., filed Nov. 3, 1981).

from", 635 F. 2d at 235, n. 1[3], and affirmed the grant of summary judgment holding:

First, the contract language at issue, albeit not "syntactical" (and, therefore, requiring interpretation and exegesis) established Petitioner's "continuing direct liability for post-termination [and post-liquidation] pension payments", 635 F. 2d at 235-36; and

Second, this not "syntactical" contract language was enforceable against the employer in a suit under ERISA whereby "Congress authorized the evolution of a federal common law of pension plans", 635 F. 2d at 237, which federal common law, along with the federal common law of labor-management contracts, justified employer liability without recourse to the arbitration process, 635 F. 2d at 236.

In its *amicus curiae* brief, the United States argues that certiorari should be denied. In so arguing, the *amicus* brief assumes—without record support, or any other support—that there is a bargaining history which sustains the interpretation of the court below as to the unsyntactical language of the contract (brief, p. 6, n. 5). The *amicus* brief further makes a factual argument as to the meaning of the pertinent contract language in which argument there is not a single reference to the precise language in issue (brief, pp. 5-9) and which argument is devoid of reference to the record (in part, surely, because there is no record to support *amicus'* factual contentions).

Petitioner urges this Court to grant certiorari and reverse the court below because, succinctly put, (1) there is no bargaining history or other factual support for the construction of the contract language espoused by the court below, which construction reads the controlling subordinate clause out of the pertinent contract paragraph; (2) there is no bargaining history or other fact to support the suppositions contained in the summary judgment opinion of the court below[4] or the suppositions contained

3. Scope of appellate review pursuant to a § 1292(b) certification deserves direction by this Court; see the cases collected in 16 Wright and Miller, *Federal Practice and Procedure* § 3929, n. 33.

4. The *nisi prius* court wrote no opinion to explain its grant of summary judgment in the face of the contract language (19a-21a).

in the *amicus* brief; and (3) the creation by the court below of a federal common law of pension liability to pay unfunded retiree benefits in the face of concededly unclear contract language is contrary to the history of pension agreements in this country[5] and contrary to Congress' legislative judgment in enacting, after strenuous debate and compromise, § 4062 of ERISA, 29 U. S. C. § 1362.

In short, this case is "cert-worthy" for the reason that the courts below, in the absence of either contractual or jurisprudential justification, have ordered the post-liquidation assets of a company, which terminated its business—and, *coincidentally*, its pension and retirement plans —in the face of mounting losses arising out of declining productivity and foreign competition in the steel industry, to be transferred from the shareholders of that company (who have not received a dividend since 1970) to retirees who, under clear contract language, agreed that "[t]he Company is free to determine the manner and means of making provision for funding and paying the pension benefits set forth in this agreement" (75a) and who, under other contract language—read out of the contract by the court below—agreed that their pensions were vested and non-forfeitable solely "to the extent those benefits are funded by the applicable assets of the trust fund . . ." (76a)[6].

Contrary to Rule 56, the Lower Courts Granted Summary Judgment Where There Is an Issue of Fact as to the Meaning of Contract Language.

Rule 56 of the Federal Rules of Civil Procedure conditions the grant of summary judgment on proof by the movant that "there is no genuine issue of material fact". The meaning of contract language is an issue of fact, and is to be resolved by the fact finder, unless the contract language is so clear and unambiguous as to permit only

5. *Nachman Corporation v. Pension Benefit Guaranty Corp., et al.*, 446 U. S. 359, 368-370, 372-373 (1980).

6. This same contract language—abrogated by the court below—is apparently standard in all Steelworkers' contracts. See n. 5 at p. 3 of the Brief in Opposition hereto.

one meaning[7]. Hence, summary judgment is not to be entered pursuant to Rule 56 when the written agreement is ambiguous. 10 Wright and Miller, *Federal Practice and Procedure*, § 2730, cases collected at n. 7. See, *Associated Press v. United States*, 326 U. S. 1 (1945).

Here, key contractual language ("is effective to the extent those benefits are funded") has been said by the court below to have "no syntactical correspondent", 635 F. 2d at 235, was construed by the court below in the subjunctive[8], and was subjected to judicial exegesis without benefit of factual text for such exegesis, such as drafting or bargaining history[9]. The exegesis was then explained:

> "Read this way, Section 10.2 might at first seem to take away what it gives: participants' rights vest 'fully,' but if the employer fails to fund a pension trust, participants have fully vested rights in scant benefits. In fact, however, the employees have rights to benefits under the Collective Bargaining Pension Agreement, not merely under a pension trust. Section 8.1 establishes that the employer may set up a pension trust, and fund it as he wills, but the provision does not confine the employer's libality for pension benefits to a pension trust. Section 8.1, then, does not oblige the employer to fund any trust; the employer could [sic] be directly liable for all pension payments due under the Agreement. Read together, Sections 8.1 and 10.2 thus confirm the employer's continuing direct liability for post-termination pension payments." 635 F. 2d at 235-36.

But the language remains unchanged—"effective to the extent . . . funded". And, at the least, the language re-

7. *Castaneda v. Dura-Vent Corp.*, 648 F. 2d 612, 619 and cases there collected (9 Cir. 1981).

8. "Even were the verb plural, it would still fail to modify the right to receive benefits." 635 F. 2d at 235.

9. "We read the collection of clauses to mean: on the date the agreement terminates, participants' rights to benefits under the Agreement vest fully, to the extent the Company has funded the benefits, as provided in Section 8." 635 F. 2d at 235.

lated back to the freedom of the employer ". . . . to determine the manner and means of making provision for funding and paying the pension benefits . . ." 635 F. 2d at 235.

Petitioner contended before the courts below—and urges here—that the language of the agreement clearly limits liability.[10] At the least, the language of § 10.2 is ambiguous and requires interpretation in the context of § 8.1.[11] Accordingly, under established summary judgment principles, Petitioner is, at the very least, entitled to a reversal of the order of the court below and a remand for the taking of testimony to supply the drafting history and bargaining history which will permit an accurate factual understanding of the contract language and which will eschew the suppositions and assumptions upon which the courts below relied and which provide the basis for the *amicus* brief.[12] In short, is the contract before the Court one in which, on its face, the employer so clearly accepts direct liability for unfunded pension benefits as to justify the grant of summary judgment against the residual general assets of the liquidated employer (and, *ipso facto*, against the shareholders and equity owners of that employer)?

The Right to Pension, and Amount of Such Pension, Directly Payable by Petitioner Is an Arbitrable Issue.

Both under the pension agreement itself and under the collective bargaining agreement of which the pension agree-

10. Correctly read with the syntactical antecedent which the court below found to be missing, § 10.2 reads as follows: "In the event that this Agreement is terminated . . . the rights of any participant . . . shall . . . be fully vested and nonforfeitable . . . [and this Agreement] is effective to the extent those benefits are funded . . ."

11. In the court below, appellees consumed ten pages of their brief espousing a reading of the contract which required ignoring some contract language, explaining away other contract language and reading other contract language out of context.

12. Compare *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620 (1944). And, see *In the Matter of M & M Transportation Company*, 288 BNA Bankruptcy Reporter D-4 (S. D. N. Y. 1980) where the district court remanded to the bankruptcy judge for fact finding as to the presence *vel non* of an exculpatory clause in the pension plan which would decide pensioners' alleged claim against the bankrupt's estate.

ment is an integral part, dispute resolution rests, in the first instance at least, in the hands of an arbitrator or impartial umpire. § 7.1 of Petitioner's pension plan provides:

> "If any difference shall arise between the Company and any participant who shall be an applicant for a pension as to such participant's right to a pension or the amount of his pension and agreement cannot be reached between the Company and a representative of the International Union, such question shall be referred to an impartial umpire to be selected by the Company and the Union. . . . The decision of the impartial umpire on any such question shall be binding on the Company, the Union and the participant." [13]

If anything is clear in this dispute, it is that ". . . a difference [has arisen] between the company and [participants in the pension plan] as to such participant's right to a pension or the amount of his pension . . ." The court below read this arbitration clause out of the contract in a single paragraph which contained no reasoned explanation, 635 F. 2d at 236.[14]

As recently as *Nolde Brothers, Inc. v. Bakery Workers,* 430 U. S. 243 (1977), this Court has held, in the context of employee claims to severance pay and vacation pay geared—like these claimed pension benefits—to an employee's length of service and the amount of his earnings, that ". . . the parties' obligations under their arbitration clause survived contract termination when the dispute was over an obliga-

13. The text of the arbitration clause in the collective bargaining agreement is set forth at pages 72a-73a of the Appendix filed with this Court on May 8, 1981.

14. "The employer also relies on the pension Agreement's arbitration clause to maintain [sic] the employees may not bring their pension benefits claim in court. The arbitration clause, however, governs disputes concerning an employee-applicant's right to a pension, or the amount of a pension. This action does not address a dispute over these employees' rights under the pension agreement. The plaintiffs in this action are retired employees; their rights have already vested. This action instead concerns the enforceability of the Agreement's direct liability clause. If the clause is enforceable, the employees rights under it are clear." 635 F. 2d at 236.

tion arguably created by the expired agreement." 430 U. S. at 252. *See also, John Wiley & Sons v. Livingston,* 376 U. S. 543 (1964) and the cases collected in both *Nolde* and *Wiley.*

The same considerations of policy which led this Court, under the reasoned leadership of the Chief Justice, to conclude that the duty to arbitrate the *Nolde Brothers* contract claims survived termination of the collective bargaining agreement lead to the conclusion that the claims of these plan participants continue to be arbitrable under either the pension agreement arbitration clause or the collective agreement arbitration clause or both.

Indeed, the lower federal courts have begun to rule—consistently—that pension plan participants—including union member plan participants—are required to exhaust administrative remedies, including the arbitration process, before resorting to litigation in a federal court. *See, e.g. Amato v. Bernard,* 618 F. 2d 559 (9th Cir. 1980), and cases there collected. Further, ERISA itself requires qualified pension plans to provide administrative remedies for participants whose claims for benefits are denied either in whole or in part, 29 U. S. C. § 1133, and the Secretary of Labor, pursuant to Congressional authority, has prescribed detailed regulations governing such administrative remedies. See, 29 C. F. R. § 2560.503-1 *et seq.* As the Court of Appeals for the Ninth Circuit said, after reviewing the policy reasons which underlie Congress' decision to require easily available dispute resolution in qualified pension plans:

> "... It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used. ..." 618 F. 2d at 567.

Just as this Court focused upon the law of the shop and the special competence of experienced arbitrators with consistent and repeated exposure to recurring labor-manage-

ment problems in fashioning the rules of arbitration for disputes arising under collective bargaining agreements in the *Steelworkers' Trilogy*, this Court—it is respectfully suggested—should direct the lower federal courts to resort to the law of the shop and the special competence of impartial arbitrators and umpires to comprehend and resolve recurring questions of pension entitlement under collective bargaining agreements and pension agreements which are based upon the "reticulated" ERISA statute and are, in themselves, "reticulated" and demanding of pragmatic and historical understanding.

The Lower Court's Denial of a Contractual Limitation of Liability Runs Counter to Historical Fact, Congressional Understanding and the *Nachman* Decision of This Court.

Writing for this Court in *Nachman Corporation v. Pension Benefit Guaranty Corp.*, 446 U. S. 359, 384-85 (1980), Justice Stevens observed:

> "But Congress plainly did not intend to prevent employers from limiting their potential direct liability to their employees. There is not a word in the statute or its legislative history suggesting that Congress ever intended to outlaw the use of such clauses.[35] On the contrary, the inclusion of a limit on an employer's contingent reimbursement liability to the PBGC measured by 30% of its net worth would be inexplicable if Congress had intended to deny employers any right to place a contractual limit on their direct liability to their employees . . .
>
> "35. Indeed, since their use had unquestionably contributed to the growth of private pension plans, their prohibition would be inconsistent with Congress' repeatedly expressed intent to encourage the maintenance of pension plans.
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> • • •
>
> "... It bears emphasis that Congress declined to adopt the suggestion that corporate assets be committed to guarantee any pension obligations which exist at termination. The 30% provision was designed as a softer measure.

Earlier in that Opinion for this Court, Justice Stevens had noted:

> ". . . normal usage in the pension field was that even if the actual realization of expected benefits might depend on the sufficiency of plan assets, they were nonetheless considered vested." 446 U. S. at 378.

The court below, contrary to "normal usage in the pension field", contrary to Congress' understanding, and contrary to this Court's understanding as reflected in *Nachman,* found as a fact that the contract language in this case did not suffice to permit this employer to limit its direct liability for unfunded pension benefits to employees.[15]

In the face of the contract language, the court below found justification for its decision to impose direct liability on the employer in "a federal common law of pension plans" authorized by Congress when it enacted ERISA, 635 F. 2d at 237. Even assuming, *arguendo,* the authority to create such a common law, the common law as created by the court below is contrary to the understanding and expectations of the Congress, of this Court, of the learned commentators and of the parties to the instant agreements.[16] Indeed, had this Petitioner any notion that the language of the agreement could—or would—be so construed it surely would not have suggested that PBGC seek a voluntary termination of the plan and appointment of a trustee.[17]

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15. PBGC as insurer has, of course, paid benefits to plaintiffs pursuant to the statute; and Heppenstall has already paid PBGC a sum of excess of 50% of its post-liquidation assets.

16. In fact, if ERISA—rather than some penumbral federal common law of pensions—were to *require* the result here reached by the court below, the retroactivity defect under the Due Process clause rejected by the Court of Appeals for the Seventh Circuit in *Nachman* would perforce require a finding that the statute is unconstitutional. *Compare* 446 U. S. at 367, n. 12. *See also* Rev. Rul. 71-91 and published DOL Rulings whereunder contrary to the *Amicus* here, the IRS and Labor Department did hold a plan such as that discovered by the court below to be unqualified.

17. *PBGC v. Heppenstall Co.,* 633 F. 2d 293, 297-98 (3d Cir. 1980).

Indeed, given the power of PBGC to seek involuntary termination of a pension plan (29 U. S. C. § 1342), it is conceivable that, given financial facts such as those which compelled this Petitioner to liquidate its business, PBGC could determine to terminate a pension plan involuntarily and thereby ripen a power in pension plan claimants (such as plaintiffs here) to strip the company's assets from the equity owners. And, of course, if the employer had funds sufficient to pay 100% of the unfunded benefit to pension claimants, the Congressional limitation to 30% of net worth would be nullified.

The financial demise of any business is a disaster for all concerned and each group of affected persons suffers some loss: employees, loss of jobs, wages and perquisites; suppliers, loss of trade; creditors, loss of payment; shareholders, loss of investment. As between employee/retirees and shareholders, Congress struck a balance in ERISA: 30 percent of net worth to employees; 70 percent of net worth to equity holders. Absent pluperfectly plain contract language to the contrary, this choice, made by Congress after a decade of study of the Nation's private pension plans is—and must be—the law.

CONCLUSION

For the reasons set forth in Petitioner's original Petition, its Reply Brief and herein, Petitioner respectfully prays that this Court issue its Writ of Certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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